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In the Supreme Court of the United States

OCTOBER TERM, 1990

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a petition to review the listing of a site on the National Priorities List was within the 90–day jurisdictional time bar of Section 113(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9613.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a–7a, is reported at 917 F.2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1990. A petition for rehearing was denied on January 11, 1991. Pet. App. 9a. The petition for a writ of certiorari was filed on April 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of

1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, to address the serious public health and environmental problems caused by improper releases of hazardous substances. CERCLA authorizes the Environmental Protection Agency (EPA) to respond to actual or threatened releases of hazardous substances,[1] both through limited, short-term removal actions,[2] and through remedial actions designed to provide permanent remedies.[3] To pay for clean-up action, the statute establishes a fund, known as the "Superfund."[4] Moreover, Section 107 of CERCLA, 42 U.S.C. 9607, imposes liability for response costs on a variety of parties, including certain past and present site owners and operators, generators of hazardous wastes, and transporters of hazardous wastes at the site. Such parties are liable for any costs of removal or remedial action incurred by the United States if the costs incurred are "not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A). The national contingency plan contains EPA's regulations implementing CERCLA, and is codified at 40 C.F.R. Pt. 300.

Section 105 of CERCLA requires EPA to establish a set of criteria for determining priorities among releases or threatened releases—the Hazard Ranking System (HRS)[5]—and then to list the "national priorities

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1 Section 104, 42 U.S.C. 9604.

2 Section 101(23), 42 U.S.C. 9601(23).

3 Section 101(24), 42 U.S.C. 9601(24).

4 Sections 111, 221, 42 U.S.C. 9611, 9631.

5 EPA applies the HRS to information concerning an observed or potential release to obtain a numerical "score" or estimate of the relative risk from the release over three "pathways" of human or environmental exposure: groundwater, surface water, and air. The HRS score is an estimate of the "probability and magnitude of harm to the human population or sensitive environment from exposure to hazardous substances as a result of contamination of ground water, surface water, or air." 47 Fed. Reg. 31,180, 31,187 (1982) (codified at 40 C.F.R. Pt. 300). Sites receiving an HRS score of 28.50 or greater are included on the National Priorities List (see page 3, *infra*) after

among the known releases or threatened releases throughout the United States," based on those criteria. 42 U.S.C. 9605(a)(8)(B). EPA promulgated the first National Priorities List (NPL) in 1983, 48 Fed. Reg. 40,658 (Sept. 8, 1983) (codified at 40 C.F.R. Pt. 300, App. B), and has subsequently updated the NPL so that it now lists more than 1200 sites. Pet. 18. Under Section 113(a) of CERCLA, 42 U.S.C. 9613(a), regulations promulgated under the Act, including the NPL, are reviewable exclusively in the United States Court of Appeals for the District of Columbia Circuit within 90 days of their promulgation.

2.a. On December 30, 1982, EPA issued a proposed NPL, designating locations which it deemed prime candidates for cleanup financed by the Superfund program. One of those sites was a portion of Commencement Bay, part of Puget Sound in Washington State, which EPA listed as "Commencement Bay Near Shore/Tide Flats." After notice and comment, EPA promulgated the NPL as a final rule on September 8, 1983. 48 Fed. Reg. 40,658–40,673 (codified at 40 C.F.R. Pt 300).

EPA based its listing of the site on several studies of the Commencement Bay area. Investigation of two facilities on the site—a chemical plant and a copper smelter—produced scores under the Hazard Ranking System high enough to warrant NPL listing. In addition, a more general study of shoreline bay areas and waterways convinced EPA that pollution was reaching the Bay from a variety of other shoreline sources. Pet. App. 4a.

EPA's investigations prior to the NPL listing confirmed that the site should include shallow bay areas, waterways, and shoreline, but without further study the agency could not identify all sources of pollution or

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notice and comment rulemaking. 48 Fed. Reg. 40,660 (1983) (codified at 40 C.F.R. Pt. 300). The HRS is codified at 40 C.F.R. Pt. 300, App. A.

the exact extent to which contamination had spread in the Commencement Bay area. Accordingly, EPA did not specify in its rulemaking the precise geographic boundaries of the site.[6] Instead, the agency's background documents described it generally as encompassing the "Tideflats Industrial Area in Tacoma, Washington," an area which

> includes heavy industry such as aluminum processing, chemical, pulp and paper, and primary metal smelting. Contamination is known to be in the industrial waterways and several land areas in the Tideflats. Problems include arsenic-laden slag and airborne dust, chemical contamination of soil and sediment, and industrial wastes.

Hazard Ranking System Worksheet for Commencement Bay. Pet. C.A. App. 1.

b. Among the various sources of pollution to the Bay is a property owned by petitioner. The property is located approximately 500 feet from a man-made tributary of the Bay, called City Waterway, and about three miles from the chemical plant. The property had long been used for numerous industrial activities. Petitioner acquired it in 1983 in order to construct a highway link, known as the Tacoma Spur, between downtown Tacoma and an interstate highway. Pet. App. 4a.

In 1984, as petitioner was preparing the property for construction, it discovered buried deposits of hazardous wastes from the earlier industrial uses. Petitioner conducted a soil and hydrological investigation which confirmed the presence of soil and groundwater contamination at Tacoma Spur, and that

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[6] EPA ordinarily does not describe a site's specific geographic boundaries when listing it on the NPL. In any event, a site may be expanded later if further study reveals a wider scope of contamination. "EPA contemplates that the preliminary description of facility boundaries at the time of scoring [under the Hazardous Ranking System] will need to be refined and im-

"groundwater containing contamination from beneath the [Tacoma Spur] project site flows directly to the City Waterway." Pet. App. 4a n.4.[7] Petitioner notified EPA of its discovery, and conducted its own operation to remove waste from the property. Pet. App. 5a.

In response, EPA, following its routine procedure upon receiving notice that a potentially hazardous site has been found, assigned the area an EPA site identification number. EPA also made a preliminary assessment of the property, to evaluate quickly the nature of the contamination. Pet. App. 5a. Later, EPA conducted a site inspection.[8] EPA reports from those evaluations concluded that groundwater contamination at Tacoma Spur was probable and that the contamination could be seeping through underground channels into the City Waterway tributary of Commencement Bay.[9]

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proved as more information is developed as to where the contamination has come to be located." 54 Fed. Reg. 13,298 (1989).

[7] Report by petitioner's hydrologists, Hart Crowser and Associates, Inc., entitled "Soil and Ground Water Quality Evaluation SR–705 Tacoma Spur" (Nov. 15, 1984), Resp. C.A. App. 5. A 1985 follow-up report prepared for petitioner confirmed that groundwater contamination was migrating from Tacoma Spur to the City Waterway and that soil contamination from petitioner's property also was "likely" reaching the same part of the site. *Id.* at 2–3.

[8] EPA's administrative procedures for conducting preliminary assessments and site inspections are found at 40 C.F.R. 300.420 and 40 C.F.R. 300.420(c) (1990).

[9] See EPA Preliminary Assessment Report, Pet. C.A. App. 44; EPA Site Inspection Report, Pet. C.A. App. 69. EPA reached the same conclusion in "Remedial Investigation" and "Feasibility Study" reports it issued concerning the Commencement Bay Nearshore/Tideflats site. See "Summary Report For the Commencement Bay-Nearshore/Tide-flats Remedial Investigation," at 67, 80; 1985 Remedial Investigation Report (RI Report), vol. 2, at 7.182, 7.242, Resp. C.A. App. 18, 49 (including Tacoma Spur on maps of the Commencement Bay site); RI Report, vol. 2, at 7.207, Resp. C.A. App. 19 (identifying Tacoma Spur as a source of pollutants to the City Waterway portion of the site).

On April 24, 1989, EPA issued petitioner a "general notice" letter, stating, in effect, that its property was part of the Commencement Bay Nearshore/Tideflats NPL site and that the Agency considered petitioner a "potentially responsible party" that might be liable for the cost of cleaning up that site in the event EPA filed an enforcement or cost recovery action under CERCLA Section 107, 42 U.S.C. 9607. Pet. App. 5a. The letter, which was also sent to many other potentially responsible parties, did not assert that petitioner was in fact liable for such costs, and did not require petitioner to take any action, other than to provide EPA with information about its property and activities. Pet. C.A. App. 105.

3. On July 26, 1989, petitioner filed a petition in the court of appeals for review of EPA's 1983 designation of the Commencement Bay site on the NPL. The court of appeals denied the petition as untimely "[b]ecause [petitioner] had reasonable notice some years ago that its property was potentially affected by the 1983 site listing, and because it failed to seek judicial review within the 90–day limitations period" specified by Section 113(a) of CERCLA, 42 U.S.C. 9613(a). Pet. App. 2a.

The court of appeals rejected petitioner's contention that because the 1983 NPL listing did not describe the precise boundaries of the site, it did not provide petitioner with adequate notice that its property could be a part of the Commencement Bay site. Citing its previous decisions regarding the NPL in *Eagle-Picher Industries* v. *EPA*, 759 F.2d 922, 932–933 (D.C. Cir. 1985) (*Eagle-Picher II*) and *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 919–921 (D.C. Cir. 1985) (*Eagle-Picher I*), the court emphasized the "'modest and limited purposes' of the NPL within the Superfund scheme"—that is, "as a tool for identifying quickly and inexpensively those sites meriting closer environmental scrutiny." Pet. App. 2a–3a. In keeping with the NPL's limited purpose, the court explained, EPA was not required to delineate the precise boundaries of hazardous waste

sites when listing them on the NPL. "[T]he EPA may include specific parcels of land within a NPL site so long as they are within the broad compass of the notice provided by the initial NPL listing." Pet. App. 5a–6a.

The court explained that its conclusion was consistent with its earlier decision in *Eagle-Picher Industries* v. *EPA*, 822 F.2d 132 (D.C. Cir. 1987) (*Eagle-Picher III*) (per curiam), where it held that "the EPA may alter or expand the boundaries of a NPL site if subsequent study reveals a wider-than-expected scope of contamination."[10] Pet. App. 6a (footnote omitted). "Standing alone," the court noted, "the change in the Agency's description of the site's size does nothing more than indicate the Agency's acquisition of more accurate information on the scope of the contamination." Pet. App. 6a n.5 (quoting *Eagle-Picher III*, 822 F.2d at 144 n.59).[11]

Applying those principles to petitioner's Tacoma Spur property, the court found that petitioner had received adequate notice in 1983 because its property "plainly fell within the broad compass of the 1983 Commencement Bay listing." Pet. App. 6a. The court noted that Tacoma Spur lies "at the core of a heavy industrial area," just 500 feet from the City Waterway tributary of Commencement Bay, and just three miles from the chemical plant. Given this location, the court concluded, petitioner "had reason to know its property could be considered a part" of the broad region described by the site's name. Pet. App. 6a.

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[10] The court in *Eagle-Picher III* upheld EPA's authority to expand an NPL site from 15 square miles to 115 square miles upon discovery of a larger than expected area of contamination. 822 F.2d at 144 n.59.

[11] The court below also noted that its decision in this case was consistent with its determination in *Eagle-Picher III*, 822 F.2d at 141–142, that EPA is not "required in every instance to assign a separate HRS score to each parcel within a NPL site." Pet. App. 6a & n.6.

If petitioner had any doubt about the status of its property under the 1983 listing, the court continued, "that doubt vanished" in 1984 when petitioner received actual notice from its own consultant that its Tacoma Spur property was contaminating another portion of the Commencement Bay site—the City Waterway. Pet. App. 6a–7a. "Having reported this matter to the EPA, [petitioner] was then—if not before—on notice that its property might be considered part of the Commencement Bay listing." *Id.* at 7a (footnote omitted).[12] Since petitioner did not file its petition for judicial review within 90 days of this actual notice, the court reasoned, the petition was untimely under 42 U.S.C. 9613(a). Pet. App. 2a.

ARGUMENT

The court of appeals correctly denied the petition for review as untimely under CERCLA Section 113(a), because the 1983 Commencement Bay listing provided sufficient notice that petitioner's property was part of a Superfund site. The court's holding does not conflict with any decision of this Court or any other decision of the District of Columbia Circuit, which has exclusive jurisdiction over such petitions. The decision below is fact-bound and does not warrant this Court's review.

Petitioner contends that the 1983 NPL did not provide adequate notice that the Tacoma Spur could be considered part of the Superfund site, and, therefore, that the 90–day jurisdictional time period imposed by CERCLA Section 113(a) was tolled until 1989, when petitioner re-

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[12] The court also rejected petitioner's claim that it was deprived of notice because it was "misled" by EPA's response to petitioner's report of contamination at the Tacoma Spur property. Notwithstanding EPA's "standard bureaucratic response" to petitioner's report, including assigning a new EPA site identification number to the Tacoma Spur, the court was "convinced that [petitioner] had ample warning that its property was very likely contributing to the despoliation of Commencement Bay and that it might therefore have an interest in the Commencement Bay NPL site designation." Pet. App. 7a n.7.

ceived EPA's letter identifying it as a "potentially responsible party." Pet. 17. Petitioner filed its petition for review within 90 days of receiving that letter. Petitioner understates the notice it received and exaggerates the notice to which it was entitled.

1. EPA listed the "Commencement Bay Nearshore/Tideflats" in the final NPL on September 8, 1983. Pet. App. 3a. Petitioner concedes that the City Waterway is part of Commencement Bay. Pet. 5; Pet. App. 7a. Petitioner's property is only 500 feet from the City Waterway, Pet. App. 6a, and hence is part of the "Tideflats" area of Commencement Bay. Although petitioner contends that "[t]he term 'Tideflats' refers to a specific geographic area located southeast of Commencement Bay known as the Tacoma Tideflats," Pet. 4, the NPL listing did not specify the "Tacoma Tideflats." As the court of appeals explained: "The nametag assigned the NPL site did not suggest that it was limited to a particular industrial facility, but instead used the name of a broader region, of which [petitioner] had reason to know its property could be considered a part."[13] Pet. App. 6a. Petitioner thus had "reasonable notice some years ago that its property was potentially affected by the 1983 site listing." *Id.* at 2a.

Petitioner contends that the 1983 listing was ambiguous, Pet. 17, and that the court of appeals would not have reviewed EPA's site designation in 1983 because petitioner's challenge would not have been ripe at that time, *id.* at 10. But uncertainty in the face of a broad site designation and a jurisdictional time bar should have prompted petitioner to protect its interests rather

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[13] EPA's Hazard Ranking Worksheet described the "Tideflats industrial area" as one contaminated by industrial activity. See pp. 3–4, *supra*. Petitioner concedes that its property, located about three miles from a chemical plant, Pet. App. 6a, was contaminated by an abandoned coal gasification plant. Pet. 5. As the court of appeals pointed out, petitioner's property "lies at the core of a heavy industrial area and was itself long used for industrial purposes." Pet. App. 6a.

than sleep on its rights and attempt to undo EPA's site designation years after the regulation promulgating it had become law. As the court of appeals stated in *Eagle-Picher I*:

> In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim. [I]f there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred. Courts simply are not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past.

759 F.2d at 909, 914.[14]

Even if the issue had been unripe at the time of the 1983 NPL listing, it clearly was ripe by 1984 when petitioner received actual notice from its own consultant that Tacoma Spur was contaminating Commencement Bay. Pet. App. 6a–7a. Informed of that fact, petitioner had no excuse for waiting five more years to file its petition for review.

2. Petitioner's claim of entitlement to specificity of notice rests on an exaggerated notion of the purposes of NPL rulemaking. Pet. App. 2a. The "modest and limited purposes" of that activity are to notify the public that EPA proposes to list a given site because serious contamination there presents a hazard, and to invite public comment on the matter. Toward that end, the NPL merely serves "to identify, quickly and inexpensively, sites that may warrant further action under

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[14] The court of appeals in *Eagle-Picher I* noted that "occasionally" exceptions may be justified in light of "changed circumstances," or where "compelling case precedent makes it clear beyond a doubt that the claim would not have been ripe during the statutory period," or to prevent manifest injustice. 759 F.2d at 914. Contrary to petitioner's contention, Pet. 14–18, the court of appeals was correct not to invoke those exceptions here.

CERCLA." *Eagle-Picher I*, 759 F.2d at 911.[15] As the court of appeals noted, "the NPL is simply a *rough list of priorities*, assembled quickly and inexpensively to comply with Congress' mandate to take action straightaway." *Eagle-Picher II*, 759 F.2d at 932 (footnote omitted) (emphasis added).

Once a site is listed on the NPL, EPA may spend Superfund money for remedial actions at the site. 40 C.F.R. 300.425(b)(1). But inclusion on the NPL does not assign liability to any person for the cost of cleaning up the site, and requires no cleanup or any other action by site owners. *Eagle-Picher II*, 759 F.2d at 920. Since inclusion of a site on the NPL merely permits EPA to spend Superfund money on remedial actions at the site, there is—contrary to petitioner's contention, Pet. 8, 18–19—no "financial impact" on property owners under CERCLA. Financial responsibility attaches only if EPA establishes that a party is liable for the cleanup costs in an enforcement action under Section 107, 42 U.S.C. 9607, and "these [enforcement] actions will be attended by all appropriate procedural safeguards," S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980).[16] Since NPL rulemaking by itself imposes no duty or liability upon anyone, EPA is not required to provide notice to property owners by specifying the precise, fixed boundaries of a site in the initial NPL listing. As the court of appeals held, EPA need only describe the "broad compass" of a site on the NPL, and may "alter or expand the boundaries" after the site is listed. Pet. App. 4a–5a.

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[15] See also S. Rep. 848, 96th Cong., 2d Sess. 60 (1980) (explaining that priority lists "serve primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions.").

[16] Significantly, a property owner may be liable for clean-up costs, even if its property is not a part of a NPL site, if its property contributes to the contamination of the site. And if contamination from a party's property contributes to an indivisible harm requiring cleanup, liability is joint and several. 42 U.S.C. 9607.

Petitioner does not argue that the decision below conflicts with the court of appeals' previous interpretations of the NPL. Instead, petitioner invokes cases involving challenges to final agency rules that imposed duties on the affected parties. See *National Air Transp. Ass'n* v. *McArtor*, 866 F.2d 483 (D.C. Cir. 1989); *Recreation Vehicle Indus. Ass'n* v. *EPA*, 653 F.2d 562 (D.C. Cir. 1981); *American Trading Transp. Co.* v. *United States*, 791 F.2d 942 (D.C. Cir. 1986). Those cases are inapplicable to the NPL, because the parties to those cases were adversely affected by the rules at issue and were therefore entitled to more specific notice that the rule in question would apply to them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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